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nied, 455 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982), and find none.

[1, 2] However, it is not clear that the Venezuelan court urged by the seller as most practicable has personal jurisdiction over the seller, or, if it has jurisdiction, that a Venezuelan court can order the necessary documentation of title to the aircraft, should the buyer prevail and that be found an appropriate remedy. Dismissal of an action because of forum inconvenience when there is in fact no alternative forum is an abuse of discretion. *See Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 842, 91 L.Ed.2d 1055 (1947) (doctrine of forum non conveniens presupposes at least two forums in which defendant amenable to process). Therefore, to avoid a further trip to Venezuela and more jurisdictional litigation, the order of dismissal must be modified to provide that it is conditional. The order should read substantially as follows: if suit is commenced by the buyer in a Venezuelan court of general jurisdiction within thirty days, the seller shall accept service, waive objections to personal jurisdiction, and, without waiving any defenses to the merits, stipulate that, if the buyer prevails and the seller is ordered to provide title documents to the aircraft, the seller will assume responsibility for effectuating the court's judgment. *Compare Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 394–95 (5th Cir.1983); *Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107, 1108–09 (5th Cir.1982) (per curiam) (suggesting that the district court on remand consider similar conditions to dismissal for forum inconvenience); *Bailey v. Dolphin Int'l*, 697 F.2d 1268, 1279–1280 (5th Cir.1983).

REMANDED for modification of the judgment of dismissal substantially in accordance with this opinion.

AFFILIATED CAPITAL CORPORATION, Etc., Plaintiff-Appellant,

v.

CITY OF HOUSTON, et al., Defendants,

Gulf Coast Cable Television and James J. McConn, Defendants-Appellees.

No. 81-2335.

United States Court of Appeals, Fifth Circuit.

March 17, 1983.

An unsuccessful applicant for a cable television franchise in the city of Houston brought suit alleging that the successful applicants and the mayor had engaged in a conspiracy in violation of the Sherman Act. The United States District Court for the Southern District of Texas, at Houston, Carl O. Bue, Jr., J., 519 F.Supp. 991, granted judgment non obstante veredicto in favor of defendants, and plaintiff appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) territorial market division of the city by the applicants for cable television franchises constituted a per se violation of the Sherman Act; such conspiracy was the classic horizontal territorial restraint for which the per se rule was designed, and (2) since a territorial market division has long been recognized as a violation of antitrust law, mayor could not escape antitrust liability on the basis of his contention that the state of the law regarding a municipal official's liability for antitrust violations was unsettled and that, because he could not have known he would be liable for violating the antitrust law, he was entitled to qualified immunity.

Reversed.

Clark, Chief Judge, filed a dissenting opinion.

1. Monopolies ⇐12(1.1)

It is not every agreement in restraint of competition that is prohibited by the Sherman Act, since almost every contract

has that effect to some extent. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. **Monopolies** ⇐12(1.10)

Most agreements allegedly violative of the Sherman Act are analyzed under the rule of reason, which obliges a court to consider whether the particular agreement places an unreasonable restraint on competition. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. **Monopolies** ⇐17(1.3)

One classic example of a per se violation of the Sherman Act is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

4. **Monopolies** ⇐17(1.3)

Vertical territorial restrictions cannot be condemned with the certainty of their horizontal counterparts. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. **Monopolies** ⇐12(6)

Territorial market division of the city of Houston by the applicants for cable television franchises constituted a per se violation of the Sherman Act; such conspiracy was the classic horizontal territorial restraint for which the per se rule was designed. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6. **Monopolies** ⇐28(1.7)

It is not relevant whether a government official knows he can be held liable for a particular violation of antitrust law, but only whether a clearly established violation exists.

7. **Monopolies** ⇐28(1.7)

Since a territorial market division, which was involved in the instant case pertaining to cable television franchises for the city of Houston, has long been recognized as a violation of antitrust law, mayor could not escape antitrust liability on the basis of his contention that the state of the law regarding a municipal official's liability for antitrust violations was unsettled and that, because he could not have known he would be liable for violating the antitrust law, he was entitled to qualified immunity. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Stephen D. Susman, William H. White, Charles J. Brink, Houston, Tex., Michael M. Barron, Austin, Tex., for plaintiff-appellant.

Rufus Wallingford, Houston, Tex., for James J. McConn.

John L. Jeffers, Richard B. Miller, Houston, Tex., for Gulf Coast Cable.

Appeal from the United States District Court For the Southern District of Texas.

Before CLARK, Chief Judge, GEE and GARZA, Circuit Judges.

GARZA, Circuit Judge:

The district court's grant of judgment *non obstante veredicto* caused the plaintiff to initiate this appeal. After a thorough consideration of the record, we find the territorial market division involved in this case to be a *per se* violation of the Sherman Act, 15 U.S.C. § 1. We, therefore, reverse the lower court judgment and reinstate the jury's award of $2,100,000 damages.

FACTS

The events which culminated in this litigation were played out in Houston, Texas, where in 1978, cable television franchises were awarded. This was not the first time that cable television for the city of Houston had been discussed. Six years earlier, the city had sought applicants for cable television franchises. In 1972, several firms submitted applications and, following the review of these applications by the Public Service and Legal Departments, two were recommended to the Mayor and City Council. The vote of Mayor and City Council determined that a franchise for the entire city be awarded to one corporation.

The unsuccessful franchise applicant, Gulf Coast Cable Television Co. [hereinafter

Gulf Coast], thereafter secured a petition of more than five hundred Houston voters calling for a referendum on the Council action.[1] When put to a vote of the populace of the city, the "monopoly" franchise was soundly defeated.

The Mayor of Houston in 1978 had been a city councilman in 1973, and accordingly, was anxious to avoid a repeat of the problems encountered. The Mayor testified at the trial below that he, therefore, determined that a number of franchises would be granted instead of the monopoly approved in 1973. Additionally, he resolved that, where qualified, local applicants would be favored. Finally, he concluded that minority participation should be permitted. Unfortunately, the Mayor did not stop there at his manipulation of the cable television franchising process.

Defendant Gulf Coast was the first of many concerns to seek a cable television franchise in 1978.[2] There is ample evidence that the city of Houston did not even initiate the franchise process; defendant Gulf Coast approached the city and made application for a franchise. This action served as the commencement of a very unusual process. The city of Houston must be characterized as a highly desirable market for cable television. The city, however, made no effort to take advantage of this fact by broadcasting, via trade publication or otherwise, its intention to award franchises. Instead of following this common practice, the city simply passively accepted applications as they arrived. From the many applications which were submitted to the Public Service Department, four emerged as strong contenders based not on the strength of their proposals, but rather the political strength of the men behind them. These four actors were Gulf Coast, Houston Cable Television Co., Houston Community Cable Television Co., and Meca. Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to work together, resolve any overlaps in their territories and present him with a finished product. He abdicated his responsibility in the franchising process to a group of powerful Houston businessmen. In turn, these businessmen became "friendly competitors" in an effort to segment the city among themselves and prevent any outsiders from competing with them.

These businessmen and their attorneys met, and over a period of time arrived at mutually agreeable franchise areas. The Mayor reentered upon the scene at this juncture, however, and informed Gulf Coast that another applicant must be added to the ranks. Westland Corporation, a group controlled in large part by the Mayor's personal attorney, must be given a franchise. The area involved was a portion of the territory sought by Gulf Coast. Conscious of both the political realities of the situation and the need to avoid competition among potential franchises, Gulf Coast decided to redraw the franchise boundaries in order to comply with McConn's wishes. Now the businessmen were prepared to present a *fait accompli* to the Mayor and City Council.

While Gulf Coast and the above-mentioned applicants were cutting out competition by cutting up the city among themselves, the plaintiff, Affiliated Capital Corporation [hereinafter Affiliated] entered the picture. Affiliated is a publicly-held corporation that owned a savings and loan association. A federal prohibition against owning both savings and loan associations and cable television systems prevented Affiliated from making application for a franchise until it sold the savings and loan association. After the mid-September sale, Affiliated hired a local attorney to check into the status of the franchising process. When the attorney contacted counsel for

1. Tex.Rev.Civ.Stat.Ann. art. 1181 (Vernon 1963) and the Charter of the city of Houston provided for this procedure.

2. Gulf Coast is a limited partnership which operates solely in the cable television business. After its unsuccessful bid for a franchise in the city of Houston in 1972, Gulf Coast remained in business and obtained franchises for a number of the small cities that lie within the Houston metropolitan area.

Gulf Coast, he was informed that Affiliated was too late because the "pie had been cut." Amazed by this news, Affiliated's president, Billy Goldberg, went to visit the Mayor, who assured him that there was still time for Affiliated to receive a fair hearing. Consequently, Affiliated made application for a cable television franchise on October 16th.

Although the city never advertised its intention to award cable television franchises, it did take several other measures during this period calculated to give the appearance that the citizens of Houston would receive quality cable television service. The Public Service Department prepared a questionnaire which was distributed to all franchise applicants. The city hired a consultant, Dr. Robert Sadowski, to evaluate the applicants based on their responses to this questionnaire. By the middle of November, Dr. Sadowski had completed a report which was highly critical of the manner in which the franchising process was being handled. He declared that it was not rational to allow the applicants themselves to divide the city into franchise territories. He concluded that this was not a procedure designed to give the citizens of Houston the best possible cable television service.

In addition to this general indictment of the process, Dr. Sadowski recommended that only two of the applicants, Meca and Cable-Com, be awarded the franchise areas they sought.[3] He urged that three applicants, Houston Cable, Westland, and Houston Community Cable, be rejected and that the size of defendant Gulf Coast's service area be substantially reduced. He apparently had doubts about the ability of Gulf Coast to service even this smaller territory so he made a personal visit to its facility. Shortly after this visit, Sadowski was fired. His conclusions were altered before the report was made public. The five ultimately successful applicants were pronounced qualified.[4]

The City Council was now prepared to take final action on the cable television franchise applications. The president of Affiliated appeared before City Council and requested that his application be given due consideration. Instead of due consideration, Council, through Councilman Johnny Goyen, offered the advice that Affiliated should go and work out an agreement with defendant and the other above-mentioned applicants.

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27–28.

The message to Goldberg was clear: it was not the Council, but rather private

3. Doctor Sadowski never evaluated the application submitted by Affiliated for this report. It was submitted after the termination of his employment.

4. Shortly before the franchise ordinances were considered by City Council, the Public Service Director submitted a letter to the City Attorney to the effect that he lacked the information necessary to judge the merits of each application. In relevant part, the letter concluded that "[w]hile these issues may have been considered by the drafting principals, and may have been addressed satisfactorily by them, I have no way of knowing this." Record on Appeal, vol. 14, at 616. The "drafting principals" were later identified as the attorneys for certain franchise applicants.

businessmen who would decide the future of cable television in Houston. When Mr. Goldberg did not make an agreement with those businessmen, the City Council and Mayor voted for the convenient franchise package with which they were presented by Gulf Coast. This action led Affiliated to the federal courthouse with the allegation that defendants had engaged in a conspiracy to prohibit its entry into the Houston cable television market, thereby violating section 1 of the Sherman Act. Specifically, the plaintiff claimed that certain applicants for cable television franchises agreed to define the territories in which they would apply for franchises, so that no two members of the conspiracy would compete for the same territory. In addition, plaintiff charged defendants with participation in a more general conspiracy to limit competition for cable television franchises by excluding non-conspirator competitors.

DISTRICT COURT JUDGMENT

At the close of evidence in the trial of the instant case, the jury was presented with a series of interrogatories. The relevant interrogatories, as well as the jury responses thereto, are reproduced below.

INTERROGATORY NO. 1

It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises. Do you find from a preponderance of the credible evidence that these arrangements were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act. Answer "yes" or "no."

ANSWER: No.

INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of Section 1 of the Sherman Act? Answer "yes" or "no."

ANSWER: Yes.

* * * * * *

INTERROGATORY NO. 4

Do you find from a preponderance of the credible evidence that any of the following persons participated in that conspiracy? Answer "yes" or "no."

a. City of Houston

Yes

b. Mayor Jim McConn

Yes

c. Gulf Coast Cable Television

Yes

INTERROGATORY NO. 5

Do you find from a preponderance of the credible evidence that either of the conspiracies, if you have so found in answer to Interrogatories 1 or 3, proximately caused injury to the plaintiff's business or property? Answer "yes" or "no."

ANSWER: Yes.

* * * * * *

INTERROGATORY NO. 6

What sum of money, if paid now in cash, do you find from a preponderance of the credible evidence would fairly and reasonably compensate plaintiff for the damages, if any, you find plaintiff has incurred? Answer in dollars and cents, if any.

ANSWER: $2,100,000.00.

The jury's verdict was not destined to be entered into judgment. In a post-trial motion, defendant Gulf Coast argued for judgment notwithstanding the verdict on three grounds. Defendant asserted that all of plaintiff's evidence had related to boundary agreements so that there was no evidence to support the jury's finding of an independent conspiracy under interrogatory three. Likewise, defendant claimed that there was no evidence exclusive of boundary agreements to support the finding of causation

on the fifth interrogatory.[5] In a thorough and carefully researched opinion, *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. 991 (S.D.Tex.1981), the district court granted the requested relief. Although the judge found evidence independent of the boundary agreements to support the answer to interrogatory three,[6] he con-

5. Defendant also argued that the *Noerr-Pennington* doctrine mandated judgment notwithstanding the verdict. This contention is discussed in a later portion of this opinion.

6. In response to defendant's motion, plaintiff cited a wealth of evidence to demonstrate a second theory of conspiracy. In its memorandum opinion the court set out all the evidence which it agreed would support a second theory of conspiracy to limit competition:

By late August 1978, Clive Runnells, on behalf of Gulf Coast, had agreed with Meca that they would be friendly competitors. Testimony of Clive Runnells. Al Levin, Affiliated Capital's lawyer during the franchising process, testified that by September 20, 1978, he contacted Bill Chamberlain, an agent of Gulf Coast. Chamberlain told him that Gulf Coast's attorney Bill Olson "was a pushing force of the cable TV situation at that point." Levin further testified that he then contacted Olson and Olson told him, "as far as I am concerned, Al, it's too late; the pie has already been cut." Olson added: "Al, tell Billy [Goldberg] he is too late on this one." "[Olson's] words were, 'the City is locked up by five franchises.'" On the day before this telephone conversation between Levin and Olson, Olson had told Jonathan Day, an attorney for Houston Cable, that Olson was "trying to put map together" and that "most of areas are defined on eastern side." Plaintiff's Exhibit 63.

On September 28, 1978 a lawyer for Houston Cable wrote to the lawyer for Gulf Coast regarding the franchise ordinance:

> Enclosed is a copy of the proposed cable television ordinance marked to show deletions and additions, including some recommended by our FCC counsel. Also enclosed is an unmarked copy for your convenience.
>
> The enclosed form of the proposed ordinance has been placed in our word processing equipment. Consequently, any changes or additions you wish to make can be easily accommodated. As we discussed, the enclosed form should be considered as an internal working draft so that we can reach an agreed proposal to present to the city.

Plaintiff's Exhibit 14. A week later he wrote another letter recounting that they had met on this franchise ordinance, and noting their discussions of various provisions of this proposed ordinance, including the provision with respect to the percentage of the City's interest in the gross revenues from the ordinances:

> Enclosed is a revised form of CATV ordinance with the changes we discussed at our last meeting in Section 8.G; Section 10.B; Section 11.D; Section 12.H, J, and M; and Section 23.A.
>
> Also enclosed is a suggested revision to Section 20.A regarding the three percent of gross revenue issue in the event we are unsuccessful in limiting the franchise fee to regular subscriber service.
>
> If you have further comments or suggestions regarding this proposed form of ordinance, please let me know.

Plaintiff's Exhibit 15. None of the referenced sections of the proposed ordinance relates to boundaries.

In October 1978, Runnells and others met with Mayor McConn. At that meeting, Runnells was informed that McConn wanted Westland to have a franchise. Westland had applied for a portion of the area sought by Gulf Coast, and the Mayor indicated to Gulf Coast that a general area, Westbury-Meyerland, was what he wanted Westland to have. Testimony of Clive Runnells; Testimony of James McConn.

On November 22, 1978, notice of the November 29th City Council agenda indicated that six (6) ordinances, five of which ultimately were approved, would be considered. On November 27, 1978, the attorney for Houston Cable, one of the applicants scheduled on the upcoming agenda, sent a final proposed cable television ordinance to the City Attorney:

> Enclosed is a revised form of the proposed cable t.v. ordinance which includes the modifications made this week-end.
>
> In order to meet the proposed time schedule, any further revisions must be agreed by 12 noon on Tuesday, November 28. Final proofing of the enclosure will be completed by that time.

Plaintiff's Exhibit 29. He also sent a copy of the ordinance to Gulf Coast's attorney, who had discussed it with the lead counsel for Houston Cable earlier that morning:

> Enclosed is the proposed cable t.v. ordinance which Jonathan Day discussed with you this morning. Also enclosed is a copy of the transmittal letter to the City attorney.
>
> I have marked significant changes in red in order to facilitate your review. If you have any questions or comments, please let me know.

Plaintiff's Exhibit 30. The next day Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were complete except for the names of the applicants and their proposed service area. Plaintiff's Exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney.

Note 6—Continued

Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the City. Plaintiff's Exhibit 35.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's Exhibit 33; those ordinances had been placed on the agenda on or before November 22, 1978, Plaintiff's Exhibit 174. When Affiliated attorney Levin heard of this, he contacted Assistant City Attorney Adrian Baer. Baer relayed the following information to Levin:

> [T]he Mayor and City Council had made their decision, and [Baer] said, 'I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive.
>
> He [,Baer,] explained to me that there were—the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli.

Testimony of Al Levin; Plaintiff's Exhibit 106.

After an on-site inspection of Gulf Coast's Bellaire facilities, Sadowski, the consultant hired by the City of Houston, told Earle, Director of Public Service, and Baer, Assistant City Attorney, that he would reject Gulf Coast's application. The next morning, Sadowski was fired. One day later a messenger from Earle retrieved the notes Sadowski had made concerning the applications. In his notes, Sadowski had not recommended that Gulf Coast's application be rejected, in spite of his oral suggestion to that effect to Earle and Baer, and he testified that he would have made no substantive changes in his report after the visit to Gulf Coast's facilities. He had recommended in his report, however, that Gulf Coast be given a smaller franchise area than that for which it had applied. When Sadowski's notes were typed by someone in the City, that recommendation was deleted. Moreover, other significant changes were reflected in the typed version of the notes Sadowski had turned over to Earle's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another area of the City rather than in the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application which was conducted on December 12, 1978, the following comments were made by Councilman Goyen:

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27–28. Subsequently, the Council discussed how to proceed with plaintiff's application, and Councilman Mann made the following suggestions:

> I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something.
>
> . . . .
>
> If you take this, fine, then see how much Gulf Coast is going to knock off this other group on farther down and then around and around.
>
> . . . .
>
> Substitute motion that this application be referred to the Legal Department and Public Service, and they are to contact the other people that have ordinances and guarantee that these boundaries are being adjusted between them, and they report back to Council.

Plaintiff's Exhibit 150 at 37, 39, 40.

Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast. Plaintiff's Exhibit 150 at 25. The survey resulted in a comparison between the area plaintiff was applying for and an area that was within Houston Cable's application, Plaintiff's Exhibit 84, and was conducted in conjunction with a proposal by Gulf Coast that if Houston Cable would give

cluded that plaintiff had failed to demonstrate that its injury was caused by anything other than defendants' boundary agreements. Thus, there was no evidence to support interrogatory five.

[T]he agreements to allocate and divide territory cannot be considered as evidence proving causation of plaintiff's injury, and no other evidence in the record, either direct or inferential, provides the necessary connection between the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise.

The testimony elicited by plaintiff from its expert witness further demonstrates that what plaintiff established was a causal relationship between the applicants' agreements to eliminate overlaps in territory and the plaintiff's failure to be awarded a franchise, rather than a relationship between the agreement to exclude non-conspirators and plaintiff's injury.

Record on Appeal, vol. 9 at 1846.

IMPACT ON COMPETITION

It is abundantly clear from the record of this case that a group of Houston businessmen decided to ensure the receipt of cable television franchises by agreeing to seek separate parts of the city. That they joined together at least with the blessing of the Mayor, if not at his behest, is also certain.[7] In order to fully comprehend the devastating impact on competition occasioned by this gentlemen's agreement, we digress briefly to set out an important characteristic of the cable television industry presented by Gulf Coast.

Note 6—Continued

the identified area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978, and December 20, 1978, by Assistant City Attorney Baer bears an alternative boundary description for the Gulf Coast franchise including the Houston Cable area, with Baer's notation: "I–10 line shifted to Hwy. 290 without Goldberg's tract—contingency." Plaintiff's Exhibit 56.

City Council favored Gulf Coast's franchise, which subsumed the area plaintiff had applied for, and at trial several councilmen and Mayor McConn testified as to their reasons therefor. McConn's concern was to keep politically influential groups content:

Q You didn't want to step on anybody's political toes, did you?
A Not if I could avoid it.
Q You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?
A Not if I could avoid it.
Q And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreements, isn't that correct?
A Yes, generally that is correct, yes, sir.
Q And isn't that what you wanted to happen?
A That would have been beautiful, if it could have happened that way.
Q But when it didn't happen and you had to make the choice between Southwest Houston and Gulf Coast, you stated that the other—you thought the other people were more politically powerful than Southwest, isn't that correct?
A Yes, sir. I don't know if I said that, but I'll say it now.

Testimony of James McConn.

Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnells had come in, Mr. Mischer had come in, and all the principals had come in, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give him what he wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any type of arrangement with Gulf Coast, and for that reason Westmoreland voted in favor of Gulf Coast.

Finally, plaintiff's expert witness, Martin Malarkey, testified at length about the detrimental results of the noncompetitive franchising process in Houston, and about the benefits to residents of other cities where the process has involved competition on the merits of the applications. According to his testimony, the benefits include lower rates, provisions for sanctions in the event of noncompliance by the franchisee, provisions for performance bonds, and provisions requiring city approval prior to changes in ownership or control of the franchises. Further, he testified that normally the city itself prepares the franchise ordinance, rather than allowing applicants to do so.

519 F.Supp. at 1000–05 (footnotes omitted).

7. Record on Appeal, vol. 12, at 450.

Defendant Gulf Coast asserts that cable television, like the electric utility, is generally considered a natural monopoly. According to the common wisdom, the extremely high fixed costs incurred in preparing a cable television company for operation prevent the survival of competition in the marketplace. Plaintiff's expert witness on the cable television industry admitted that it did not make economic sense to grant franchises with overlapping boundaries. Record on Appeal, vol. 35, at 28. The economies of scale do not approach those of electric utilities but the theory for both industries holds that the long-run average costs tend to fall as output increases. We assume for purposes of this discussion that cable television is indeed a natural monopoly and proceed to discuss the pernicious effects of the conspiracy given this factor.

Defendant Gulf Coast argues that since cable television is a natural monopoly and competition within franchise areas is impractical, the division of territories caused no harm. The boundary agreements did nothing more than conform to an important characteristic of this industry. In reality, however, the impact of these agreements is all the more devastating precisely because a natural monopoly is involved.

If there is to be no competition within a given territory, competition is only possible before the franchise is granted. Unfortunately for both Affiliated Capital and the citizens of Houston, there was no competition between the corporations that received franchises. The result was lower quality, higher priced cable television for Houston.[8]

Plaintiff's expert witness, Martin Malarkey, compared the Houston cable television ordinance with those of a number of Texas cities.[9] He testified that while no performance bond was required in Houston, it was common practice to require one. With regard to rates, the Houston ordinance states that rates can be changed upon sixty days' notice unless the city suspends them by calling a public hearing. The other cities do not countenance this practice of allowing the companies to make the first move toward rate increases. Franchise fees are also lower in Houston because the city receives three percent of gross revenues *excluding* revenues from connections, reconnections, and sale or rental of equipment. Each customer must rent a converter for the price of $2.50 per month. When this amount is calculated for 100,000 subscribers over a year's time, the resulting sum equals a substantial loss for city coffers.

In addition to opining about the relative merits of the Houston ordinance, Malarkey also noted that the procedure employed in Houston did not even permit an adequate determination of the merits of each application. He stated that the city did not adequately review the financial qualifications of the applicants.[10] He also asserted that all of the applications were woefully substandard.[11]

By far the most searing indictment of the procedure comes from a simple comparison of the requirements of the 1973 and 1979 ordinances, as the following colloquy with the expert witness demonstrates:

Q Sir, as a further benchmark of the Houston franchising process in 1978, did I ask you to compare the franchise ordinance awarded by the City of Houston in 1973 with the ordinance awarded in '79?

A Yes, sir, you did.

Q If you had consulted for the City of Houston in 1978, would you have made this comparison as a matter of course?

A Yes, sir.

Q All right. Was the '73 ordinance, Mr. Malarkey, awarded by Houston in certain respects a better deal for the Houston consumers than the '79 ordinance?

A Yes, it was.

Q Did the '73 ordinance require a performance bond?

8. Record on Appeal, vol. 34, at 23–27.

9. Record on Appeal, vol. 34, at 13–26.

10. Record on Appeal, vol. 33, at 53–54.

11. Record on Appeal, vol. 33, at 58–59.

A It did.

Q In what amount?

A $1 million, as I recall.

Q Did the '79 ordinance require a performance bond?

A No, sir.

Q Did the '73 ordinance require free connections for city buildings, schools and colleges?

A Yes, sir, it did.

Q Did the '79 ordinance require such free connections?

A No, sir.

Q Did the '73 ordinance require commencement of construction within 90 days after obtaining all necessary permits, licenses and certificates?

A Yes, it did.

Q Did the '79 ordinance have that type of construction commencement schedule?

A No, sir, it did not.

Q Did the '73 ordinance require that the 3 per cent franchise fee be paid to the city based upon all revenues, including revenues from the sale or rental of converters?

A It required payment on all revenues.

Q Did the '79 ordinance require payment on all revenues?

A No, sir, it did not.

Record on Appeal, vol. 34, at 27–28.

PER SE RULE

[1, 2] Section 1 of the Sherman Act proscribes "[e]very contract, combination ... or conspiracy in restraint of trade or commerce ...." As the myriad of cases which interpret those words make clear, it is not *every* agreement in restraint of competition that is prohibited since almost every contract has that effect to some extent. In fact, most agreements are analyzed under the rule of reason.[12] This rule obliges a court to consider whether the particular agreement places an unreasonable restraint on competition.

However, as the Supreme Court declared very recently in *Arizona v. Maricopa County Medical Society*, —— U.S. ——, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982),

> [t]he elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 [78 S.Ct. 514, 518, 2 L.Ed.2d 545] (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609–610 [92 S.Ct. 1126, 1134–1135, 31 L.Ed.2d 515] (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context.

Id., at 609, n. 10 [92 S.Ct. at 1134, n. 10]; *Northern Pac. R. Co. v. United States*, *supra* [356 U.S.] at 5 [78 S.Ct. at 518].

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a

12. In *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), Justice Brandeis set forth the following classic statement of the rule of reason:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. at 238, 38 S.Ct. at 244.

> conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

102 S.Ct. at 2472–73 (footnotes omitted).

[3] A limited number of practices have been condemned by *per se* rules.[13] The Supreme Court, in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), declared that "[o]ne of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." 405 U.S. at 608, 92 S.Ct. at 1133. Such agreements have been classified as naked restraints of trade. A long line of cases stretching back to the nineteenth century has condemned market division. *E.g., Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967); *Gainesville Utilities Department v. Florida Power and Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424 (1978).

Defendants argue vigorously against a *per se* analysis in the instant case. They concede that horizontal market division is a *per se* violation of section 1. The boundary agreements in this case, however, had no effect until they received the City Council's stamp of approval. This vertical characteristic, defendants assert, must take this case outside the *per se* rule.[14]

[4] It is true that this Court has applied the rule of reason to cases involving vertical territorial restrictions. *Joe Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570 (1982). Vertical territorial restrictions cannot be condemned with the certainty of their horizontal counterparts. As the Supreme Court recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977),

> [t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.

433 U.S. at 51, 97 S.Ct. at 2558 (footnotes omitted).

[5] There is no question here, as there is in a vertical territorial restraint case, of a stimulation of competition. The agreement between the conspirators to "cut the pie" served only to eliminate competition from other applicants such as Affiliated. As Mr. Justice Hughes recognized in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933), "Realities must dominate the judgment.... The Anti-Trust Act aims at substance." 288 U.S. at 360, 53 S.Ct. at 474, *quoted in Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 47, 97 S.Ct. at 2556. The conspiracy charged in this case is the classic horizontal territorial restraint for which the *per se* rule was designed. The fact that the Mayor and City Council were involved is of no moment except as it relates to the immunity questions with which we must now deal.

Although the district court grounded its grant of judgment on the lack of causation

13. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (citations omitted).

14. Defendant Gulf Coast also asserts that a *per se* analysis is inappropriate "in this 'market' for franchises where nothing is being bought or sold in the normal sense ...." Defendant's Brief at 26–27. In response, plaintiff notes that one of the oldest, most frequently cited cases involving territorial market division dealt with a similar practice. *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 [20 S.Ct. 96, 44 L.Ed. 136] where the Court condemned an agreement between pipe manufacturers to divide territories and apportion the business among themselves. We reject defendant's proffered distinction.

evidence, the court went on to consider the applicability of the immunity/exemption doctrines which could have precluded liability even if an antitrust violation had been established. The lower court rejected the applicability of these doctrines, and we adopt that portion of the district court's opinion. *Affiliated Capital Corp. v. City of Houston*, 519 F.Supp. at 1012–1029.[15]

Mayor McConn argues strenuously that a recent Supreme Court decision, *Harlow v. Fitzgerald*, — U.S. —, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), guarantees his immunity from liability. That case announced that qualified or "good faith" immunity for public officials would be judged solely by an objective inquiry. The Court found that the subjective inquiry had proven unworkable:

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.
>
> In the context of *Butz*'s attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broadranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

102 S.Ct. at 2737–38 (footnotes omitted). The Court held that

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

102 S.Ct. at 2738.

[6, 7] McConn contends that the state of the law regarding a municipal official's liability for antitrust violations was unsettled in 1978. Since he could not have known that he would be liable for violating the antitrust law, the argument continues, he is entitled to qualified immunity. This argument is based upon a misinterpretation of the Supreme Court's statement. It is not relevant whether the official knows he can be held liable for a particular violation of the antitrust law, only whether a clearly established violation exists. As stated throughout this opinion, territorial market division has long been recognized as a violation of the antitrust law. McConn cannot escape liability on this basis.

CONCLUSION

For the reasons set forth, we conclude that the territorial market division charged is a *per se* violation of section 1 of the Sherman Act. The boundary agreements

15. We note that the city of Houston was dismissed as a party to this action, with the concurrence of plaintiff.

certainly prevented plaintiff from securing a cable television franchise. We are constrained, therefore, to reverse the judgment of the court below and reinstate the jury's verdict of $2,100,000 in damages.

REVERSED.

CLARK, Chief Judge, dissenting:

I respectfully dissent.

The majority presumes that cable television franchises are natural monopolies. Based on this assumption, it further presumes that competition is only possible before a franchise is granted. On these two presumptions, the court then erects a third—that the rule of reason would so certainly condemn an agreement to divide areas of cable television service in a single city that, for sake of efficiency, the agreement must be ruled invalid *per se*. These presumptions are not just unwarranted, they are contrary to proof in this record about the particular business of cable television franchising in Houston, Texas.

This case does not concern price fixing. Nor does it present a case of a group boycott, tying arrangement or a horizontal division of markets (though each of these categories has not invariably been held to be a naked restraint of trade). No applicant proposed to serve the whole city of Houston. The Council would not have accepted such an application. Therefore, the relevant geographic market for potential franchisees here is not the city of Houston, but some part or area thereof. No absolute *per se* category is presented. Absent the majority's presumptions, there is no way for me to predict with confidence that the rule of reason will condemn the present boundary agreements between franchise applicants which this jury found reasonable. Thus, I cannot say that the conduct of the applicants for franchises in this case is manifestly anticompetitive.

Under the district court's instructions, the jury was asked: Was the agreement of defendant, Gulf Coast, with other companies to allocate cable television franchise territories part of a conspiracy which constituted an unreasonable restraint of trade? The jury said no. The trial court who heard the witnesses and took the evidence found this answer was supported by the record. The majority does not controvert this. Rather, it acknowledges that the political history of cable television in Houston shows Houston voters rejected a single "monopoly" cable television franchising effort in 1972, and that the mayor's anxiety to avoid a similar situation in 1978 led to the city's demand for multiple franchises. Every applicant, including plaintiff, accepted this requirement.

Instead of analyzing the impact of these facts, the majority chooses to rely only on the theoretical testimony of the plaintiff's aptly named expert to create a series of presumptions. From other proof, a reasonable jury could have found the mayor's political concern, and a concomitant refusal by the Council to get into actually drawing boundary lines, dominated the actions of the applicants and produced a reasonable boundary agreement. Also, the jury could have found from the proof that a reasonable way to secure multiple franchises was to tell all prospective franchisees that applicants must define individual service areas without gaps and without overlaps.

There is no showing that plaintiff or any other potential applicant was limited as to formation of its own group of bidders. All those who wanted franchises were faced with the city's ukases that no single city-wide franchise would be granted and that the Council would not draw lines. There was an opportunity for competition in the pre-award area, even for those who started as late as plaintiff. They could have become members of a new group of bidders or tried to attract members of the existing group to go with them. Moreover, the proof shows the city could reject any part or all of any area sought when the matter came before the Council for approval. No testimony suggested that plaintiff did not have an opportunity to urge the city to require changed boundaries to make room for its tardy entry. Indeed, it did so and a request for accommodation was made. Thus, the mere fact that Gulf Coast refused Gold-

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berg's demand that it give up a substantial part of the area the agreement allowed it to request was not enough to require the jury to find the boundary agreement kept plaintiff from competing.

There is another pro-competitive aspect of the proof that even more clearly argues against the imposition of a *per se* rule to this particular territorial agreement. The statements of plaintiff's president, Billy Goldberg, to the city Council told the jury how competition would work between franchised areas *after* they were awarded.

> "In determining the geographical breakdown of cable TV franchise areas it is my judgment that this Council is wise awarding multiple franchises throughout the city. I will say a little bit more on that at a later time.
>
> "Conceptually, the notion of a smaller, more responsive franchise is likely to be substantially more acceptable to this community. Careful thoughts should be given to the proposition that no one applicant should receive more area to serve than could be constructed and energized within a reasonable period of time.
>
> ....
>
> "It seems to me that . . . our application for this area is more in keeping with the wishes of the people of this community previously expressed, where they indicated to me, and I think to everyone, the desire not to have the vast territories of our city under one operation, and there's a reason for it. There's a reason of competition.
>
> ". . . [L]et me tell you where the competition comes in.
>
> "If this Council does as I think it will do, divide this city up into as small portions as possible, you will have various cable companies throughout the city, and everybody in the city knows what the other fellow is doing. He's either got a friend or a relative over there, and they will be saying, 'Well, why is it, Mr. Goldberg, that your system and Affiliated's system doesn't have so-and-so, and if you go to the other part of town they have that service,' and that's where the area of competition comes in, and I think it's healthy."

Franchise areas, levels of service, and fees were not immutable. If a franchisee's level of performance did not keep pace with neighboring cable companies, all sorts of post-franchise problems could occur, up to and including another referendum to undo everything.

I do not understand how an appellate court can erect the majority's pyramid of presumptions based on one expert's opinion, contradicted by his own employer, and allow it to overcome a factfinding by a jury that finds support in the record.

Because I believe that the jury validly found that the agreement to submit non-overlapping bids met the rule of reason, I am further compelled to agree with the district court that the finding that any later conspiracy to refuse plaintiff's request to participate in the agreement could not have caused plaintiff harm. The interrogatories on separate conspiracies were put separately at plaintiff's insistence to accord with its theory that separate conspiracies were proven. What turns out to have been a tactical mistake should not be allowed to bootstrap to credibility a verdict that the proof establishes was unwarranted. This is especially true where the appellate device for the levitation is supplied by unsupported presumptions of wrongdoing.

The proof tells me, just as it told the jury, that those who wanted to seek a cable television franchise in Houston in 1978 knew the only way to get one was to agree with others on boundaries for multiple service areas that would cover the city without overlaps. The jury found that after the group had validly made these agreements, plaintiff sought to have the group redo its plans and was improperly rebuffed. The district court reasoned that the failure to get a franchise was solely the result of the valid agreement, not the invalid rebuff. So do I.

At a time when the clear trend in antitrust law is away from the use of the "expedient" *per se* rule, except for price-fixing, and toward proving the truth of

particular transactions, it seems altogether wrong to rely on speculative malarkey to assume that a conspiracy to restrain trade existed.

I would affirm the district court.[1]

Deborah M. BERTRAND, Etc., et al., Plaintiffs-Appellants,

v.

INTERNATIONAL MOORING & MARINE, INC., et al., Defendants-Appellees,

v.

FIDELITY & CASUALTY COMPANY, Defendant-Appellant.

No. 81-3450.

United States Court of Appeals, Fifth Circuit.

March 17, 1983.

Rehearing and Rehearing En Banc Denied June 27, 1983.

Anchorhandlers, who were injured in one-vehicle accident while returning from one-week oil rig relocation job, appealed from summary judgment granted by the United States District Court for the Western District of Louisiana, John M. Shaw, J., 517 F.Supp. 342, on defendants' motion in plaintiffs' Jones Act action. The Court of Appeals, Ingraham, Circuit Judge, held that substantial issues of material fact existed as to whether plaintiffs were seamen because they performed substantial portion of their work on vessels or by virtue of permanent attachment to vessels, precluding summary judgment.

Reversed and remanded.

1. Federal Courts ⇐595

Denial of plaintiffs' motion for summary judgment on issue of seaman status in Jones Act suit was interlocutory order and unappealable, and therefore only issue for review was whether district court erred in granting summary judgment for defendants. Jones Act, 46 U.S.C.A. § 688.

2. Seamen ⇐29(1)
Workers' Compensation ⇐262

Coverage under Jones Act and coverage under Longshoremen's and Harbor Workers' Compensation Act are mutually exclusive. Jones Act, 46 U.S.C.A. § 688; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

3. Federal Civil Procedure ⇐2470.2
Seamen ⇐29(5.16)

Although issue of seaman status is to be left to jury in Jones Act action even when claim to such status is to be relatively marginal one, summary judgment or directed verdict by court is proper in cases in which underlying facts are undisputed and record reveals no evidence from which reasonable persons might draw conflicting inferences about such facts. Jones Act, 46 U.S.C.A. § 688.

4. Seamen ⇐29(1)

For Jones Act purposes, one can be a member of crew of numerous vessels which have common ownership or control. Jones Act, 46 U.S.C.A. § 688.

1. As an aside, and because the majority's holding required that it address the *Noerr-Pennington* doctrine, I would briefly point out that the district court's analysis of this issue (the only analysis on which the majority relies) necessarily depends on a fact determination that the city and mayor participated in a conspiracy to unreasonably restrain trade by requiring defendants to agree on territorial boundaries. In adopting this reasoning, the majority overlooks the same basic premise missed by the district court. This judicial fact-finding is antithetical to the district court's determination that adequate proof supported the jury's finding to the contrary. That the decision-makers may have been members of a later conspiracy to refuse to change boundary lines does not affect their administrative position vis-a-vis the initial agreement.

MM 96-175

of persecution, *Rejaie v. Immigration and Naturalization Service*, 691 F.2d 139, 146 (3d Cir.1982), rather than merely a "well-founded fear" of persecution, which latter standard they contend Congress, by enacting the Refugee Act of 1980, intended to make applicable to cases involving the withholding of deportation under section 243(h). The petitioners rely heavily upon the reasoning and conclusion to this effect of the Second Circuit in *Stevic v. Sava*, 678 F.2d 401, 408–09 (5th Cir.1982).

However, the Supreme Court granted certiorari in *Stevic*, 460 U.S. 1010, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983), and, resolving a conflict between the circuits, reversed the Second Circuit and rejected its analysis in *Immigration and Naturalization Service v. Stevic*, — U.S. —, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984). With specific reference to the issue before us, the Court held that " 'the clear probability of persecution' standards remains applicable to § 243(h) withholding of deportation claims." — U.S. at —, 104 S.Ct. at 2501.

As we apprehend the petitioners' argument, their sole contention of error is that, however articulated, both the immigration judge and the board required them to establish "a clear probability of persecution" before deportation would be withheld under section 243(h). If the board indeed did so,[2] the Supreme Court's decision in *Stevic* renders this contention meritless. Nor do we understand the petitioners to contend that their proof established a "clear probability of persecution" so as to justify withholding of deportation under the statutory provision.

Accordingly, finding no merit to the petitioners' contention, we AFFIRM.

AFFIRMED.

or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1980).

2. The board also held that, even if a lesser standard of "good reason" or "realistic likelihood" were applied, the petitioners had failed to establish that their brother's occupation as a soldier will result in their persecution within the meaning of the Act. We need not reach these determinations, since no contention of error as to them is raised.

AFFILIATED CAPITAL CORPORATION, etc., Plaintiff-Appellant,

v.

CITY OF HOUSTON, et al., Defendants,

Gulf Coast Cable Television and James J. McConn, Defendants-Appellees.

No. 81-2335.

United States Court of Appeals, Fifth Circuit.

Sept. 17, 1984.

Stephen D. Susman, William H. White, Charles J. Brink, Houston, Tex., Michael M. Barron, Austin, Tex., for plaintiff-appellant.

Rufus Wallingford, Layne E. Kruse, Houston, Tex., for City of Houston and Jim McConn.

Richard B. Miller, Theodore F. Weiss, Jr., John L. Jeffers, Richard B. Miller, Houston, Tex., for Gulf Coast Cable.

Appeal from the United States District Court for the Southern District of Texas.

Prior reports: 735 F.2d 1555; 700 F.2d 226; 519 F.Supp. 991.

ON PETITION FOR REHEARING

Before CLARK, Chief Judge, GEE, RUBIN, GARZA, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing of Gulf Coast Cable Television

* Judges Randall and Garwood did not participate in this decision. Judge Brown who was a member of the Court at the time of the en banc decision, took senior status subsequent to the decision and, therefore, is not qualified to participate in the order on petition for rehearing. Judge Garza, now a senior judge of this circuit,

filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLARK, Chief Judge, with whom REAVLEY and JOLLY, Circuit Judges, join, dissenting:

I respectfully dissent from the refusal of the en banc court to grant rehearing for the reasons stated in my dissent, plus the following.

In their petition for rehearing, defendant Gulf Coast Cable Television irrefutably points out that the record does not suggest the slightest basis for the majority's assumption that in finding the boundary agreements proper the jury believed "they were passing on the question of whether it was better to have one franchise for the city or multiple franchises." 735 F.2d at 1555. The chief support which the majority urges for this critical assumption—that a jury note asked if a yes vote on question # 3 obviated a need to answer question # 1—is itself in error. The full note the jury sent the court posed alternative questions. It read:

> Assuming a "yes" answer to No. 1, are we to bypass No. 3.?
>
> The second question is, "Assuming we want to vote "yes" on No. 3, is there any point in voting on No. 1?"

Obviously both questions were equally open at that point in the deliberations. All the jury wanted to know was whether the questions were mutually exclusive.

Having been put to answer both question # 1 and question # 3 (at the insistence of plaintiff), the answers the jury gave clearly were reconcilable only as the district court reconciled them. This appellate court's assumption about question # 1 negates the jury's verdict. With all due respect, the majority's new en banc basis for decision, though not as sweeping as its per se panel ruling, is still wrong, wrong, wrong.

is participating as a member of the panel that initially considered the appeal now subject to en banc review. Judge Robert M. Hill was not a member of the court when this case was decided by the court en banc and did not participate in this decision.

UNITED STATES of America, Plaintiff-Appellee,

v.

Billy Joe NICHOLS, Defendant-Appellant.

No. 83-3511.

United States Court of Appeals, Fifth Circuit.

Sept. 17, 1984.

Rehearing and Rehearing En Banc Denied Oct. 22, 1984.

Defendant appealed from a ruling of the United States District Court for the Eastern District of Louisiana, Peter Beer, J., which rejected his pleas of double jeopardy. The Court of Appeals, Politz, Circuit Judge, held that: (1) prior convictions of conspiracy to import cocaine and conspiracy to possess with intent to distribute cocaine, based on one shipment of cocaine, barred, on double jeopardy grounds, pending prosecution for conspiracy to import and possess cocaine with intent to distribute; and (2) prior convictions did not bar pending prosecution for the substantive offenses.

Affirmed in part and reversed in part.

1. Criminal Law ⇐330

When a defendant comes forward with a prima facie nonfrivolous double jeopardy claim, burden of establishing that the indictments charged separate crimes is most equitably placed on government. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐161

Double jeopardy bar protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction

[12] Abatement and prevention of water pollution by toxic substances, including PCBs, fall within the purview of the CWA. The ordinances at issue appear to constitute a proper exercise of local governmental authority in a manner acknowledged and preserved to the states by section 510 of the CWA, 33 U.S.C. § 1370. The ordinances at issue, thus, appear to be excepted from TSCA's express preemption under section 2617(a)(2)(B)(ii).

For the aforestated reasons, the Court cannot conclusively determine that the Second Question must be answered in the negative.[9] Therefore, Plaintiffs' motion, seeking an Order of the Court entering partial summary judgment in their favor, and against the Defendant City of Dayton, on Plaintiffs' first claim for relief (i. e., that the ordinances are invalid for reason of federal preemption) is not well taken and is overruled.

Counsel will take note that a conference call will be had with Court and counsel at 4:30 p. m. on Thursday, August 27, 1981, for the purpose of setting forth further procedures to be followed in the disposition of this case.

9. Indeed, based on the discussion in text, it would appear to follow that the *Second Question* (which is predominantly a question of law) should now be answered in the affirmative. However, the Court declines to do so at this time since such action would, in effect, grant an *unsolicited* partial summary judgment in the City's favor. Moreover, even if the *Second Question* might have been answered in the negative (in the abstract), the record at this juncture, as the City indirectly but correctly points out, is essentially devoid of anything but oblique support for the most basic background facts (e. g., the fact that Plaintiffs are storing PCBs in Dayton), and, therefore, would be wholly inappropriate for the entry of judgment in *either* party's favor. The Court expects that Plaintiffs misunderstood the Court's order, to provide "appropriate submissions addressed to factual questions," as being limited to submission of certified copies of the ordinances in question, and materials directed to the *Third Question*. As a result, the factual development of this case, even for the limited purpose of resolving a rather narrowly confined summary judgment motion, has been especially dissatisfying.

AFFILIATED CAPITAL CORPORATION, et al., Plaintiffs,

v.

CITY OF HOUSTON, et al., Defendants.

Civ. A. No. H-79-1331.

United States District Court,
S. D. Texas,
Houston Division.

July 7, 1981.

Plaintiff applicant, defendant applicant, city, and city mayor brought posttrial motions following jury verdict in favor of plaintiffs in antitrust suit involving award of cable television franchises. The District Court for the Southern District of Texas, Carl O. Bue, Jr., J., held that: (1) evidence was sufficient to allow jury to infer that each of the defendants had participated in conspiracy to limit competition for cable television franchises among coconspirators, and (2) since only evidence presented at trial to demonstrate why plaintiff applicant did not receive a cable television franchise was that defendant applicant refused to readjust agreements between all conspirators to allocate and divide territory, and since such agreements could not be considered as evidence of conspiracy to limit competition, as jury found that such agreements were not part of conspiracy in unreasonable restraint of trade in their answer to an interrogatory, no evidence provided necessary connection between plaintiff applicant's theory of conspiracy to limit competition and its failure to receive a franchise, and therefore defendants were entitled to

granting of their motion for judgment notwithstanding the verdict.

Ordered accordingly.

1. Federal Civil Procedure ⇐2217

District Court is required to search for a view of the case that makes the jury answers consistent; even if a conflict exists, the Court must inquire whether the inconsistency can nonetheless be read as a consistent expression of intent.

2. Monopolies ⇐28(8)

Answer to first jury interrogatory, which encompassed issue of whether boundary agreements between two or more cable television franchise applicants, including defendant applicant, were part of an illegal conspiracy, and to which jury responded in the negative, and second interrogatory, which encompassed issue of whether any of the defendants in antitrust suit participated in an illegal conspiracy to insure that only coconspirators would receive franchises, and to which jury responded in the affirmative, were consistent expressions of intent that defendants were liable for participation in a conspiracy to limit competition, notwithstanding that the boundary agreements were not part of the conspiracy. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

3. Monopolies ⇐28(7.4)

Even though jury in antitrust suit responded in the negative to interrogatory encompassing issue of whether boundary agreements between two or more cable television franchise applicants, including defendant applicant, were part of an illegal conspiracy, evidence pertaining to those agreements could demonstrate the parties' intent to conspire to limit competition, when considered cumulatively with independent evidence of conspiracy; however, in light of the jury's finding, evidence pertaining to those agreements, or inferences to be drawn therefrom, could not be considered as evidence sufficient to prove the existence of a conspiracy, rather, evidence of other conduct, wholly unrelated to the boundary agreements, was required to be present in the record to sustain jury's affirmative answer that such conspiracy to limit competition existed. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

4. Monopolies ⇐28(7.4)

Evidence in antitrust suit was sufficient to allow jury to infer that each of the defendants had participated in conspiracy to limit competition for cable television franchises from nonconspirators and to limit competition among coconspirators. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. Monopolies ⇐28(7.4)

Since only evidence presented at trial in antitrust suit to demonstrate why plaintiff applicant did not receive a cable television franchise was that defendant applicant refused to readjust agreements between all conspirators to allocate and divide territory, and since such agreements could not be considered as evidence of conspiracy to limit competition, as jury found that such agreements were not part of conspiracy in unreasonable restraint of trade in their answer to an interrogatory, no evidence provided necessary connection between plaintiff applicant's theory of a conspiracy to limit competition and its failure to receive a franchise, and therefore defendants were entitled to granting of their motion for judgment notwithstanding the verdict. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6. Monopolies ⇐24(7)

Injunctive relief pursuant to antitrust laws is available even though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

7. Monopolies ⇐24(7)

In order to receive injunctive relief pursuant to antitrust laws, a private plaintiff must not only show violation of anti-

trust laws, but show also impact of violations upon him, for example, some injury, or threatened injury where injunctive relief only is sought, proximately resulting from antitrust violation. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

8. **Monopolies** ⇐24(7)

Even if plaintiff applicant had demonstrated causation between conspiracy to limit competition and its failure to receive a cable television franchise, it would not have been entitled to an injunction in form of a prohibition against further agreements in restraint of trade, as plaintiff applicant failed to demonstrate a "significant threat of injury" in having its application turned down, since its own expert witness testified that awarding two franchises in same area would not be economically feasible, or in reapplying once current franchises expired, since applicant's counsel assured the court that it would not seek a cable television franchise in the city even if the area for which it had originally applied became available; therefore, plaintiff applicant was without standing to seek such injunction. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

9. **Monopolies** ⇐24(7)

Plaintiff applicant would not be entitled to an injunction to void cable television franchise awarded defendant applicant even if plaintiff applicant had demonstrated causation between conspiracy to limit competition and its failure to receive a franchise, as plaintiff applicant would therefore have received both damages, calculated on the basis of the fair market value of the franchise it did not receive, and an opportunity to compete again for the franchise, which would have afforded it a double recovery, one at law, and one in equity. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

10. **Monopolies** ⇐12(16), 28(7)

Evidence in antitrust suit demonstrated active participation and orchestration of public officials in conspiracy to limit competition and granting of cable television franchises, and therefore defendant applicant, one of the conspirators, would not be immune under doctrine which provides that, regardless of their intent or purpose, joint efforts to influence public officials do not constitute illegal conduct, either standing alone or as part of a broader scheme itself in violation of antitrust laws, as the "coconspirator" exception to the doctrine excepts situations from immunity under the doctrine where one or more of the public officials involved was a participant in the conspiracy. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

11. **Monopolies** ⇐12(15.5)

When restraint of trade is result of valid governmental action which was induced by the joint efforts of private parties, those joint efforts are immune from antitrust liability; when, however, the governmental action is rendered invalid by the illegal, not merely unethical, conduct of the governmental entity acting as a coconspirator, the joint efforts of the private parties are not automatically entitled to immunity. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

12. **Monopolies** ⇐12(15.5)

Where municipalities, or their agents acting in official capacities, are proven, along with private parties, to have engaged in a conspiracy in restraint of trade, the result is that the actions which the private party sought to induce were unlawful and therefore rendered at least invalid if not nongovernmental. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

13. **Monopolies** ⇐12(16)

Defendant applicant could not be immune from conspiracy to limit competition and granting of cable television franchises under rule that the antitrust laws were not intended to apply to state action, as applicant failed to demonstrate that the anticompetitive activities were compelled by direction of the state acting as a sovereign. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

14. Monopolies ⇐12(16)

Various statutes and constitutional provisions applicable to cable television franchising demonstrate no intent on the part of the Texas legislature that the franchising process in home rule cities is to be anticompetitive, or that the state actively supervises the implementation of any anticompetitive policy addressed to franchising, and therefore city would not be immune from charges of conspiring to limit competition in granting of cable television franchises under rule that antitrust laws were not intended to apply the state action. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

Charles J. Brink, Houston, Tex., for plaintiffs.

Stephen D. Susman, Susman & McGowan, Houston, Tex., for plaintiffs.

Rufus Wallingford, Fulbright & Jaworski, Houston, Tex., for defendants City of Houston and Mayor McConn.

Richard B. Miller, Baker & Botts, Houston, Tex., for defendant Gulf Coast Cable Television.

MEMORANDUM AND ORDER

CARL O. BUE, Jr., District Judge.

I. The Pending Motions and The Court's Ruling

Various post-trial motions are pending before the Court: (1) plaintiff's Motion for Injunctive Relief and for Entry of Judgment in Accordance with the Verdict; (2) defendant McConn's Motion for Judgment on the Verdict; (3) defendant Gulf Coast's Alternative Motions for Judgment on the Verdict, Judgment Notwithstanding the Verdict or for New Trial; and (4) defendants City of Houston's and McConn's Motion for Judgment Notwithstanding the Verdict. Having considered the record of this case, the issues addressed in the memoranda, and the arguments of counsel, the Court rules as follows with regard to the motions: (1) plaintiff's motion should be denied in its entirety; (2) defendants' motions for judgment on the verdict or for new trial should be denied; and (3) defendants' motions for judgment notwithstanding the verdict should be granted.[1]

In this complex and protracted anti-trust case which resulted in a jury verdict for the plaintiff, the instant rulings by the Court are necessarily expanded upon at length in light of the trial record to explain the reasoning utilized in reaching a decision adverse to plaintiff. The issues basically revolve around the meaning of two of the jury's answers to interrogatories propounded at the close of the evidence and the Court's obligation under the law at this stage of the trial to uphold the verdict if supported by the record. While persuaded that the plaintiff's proof can be viewed as advancing a second theory of conspiracy to limit competition for cable franchises separate and apart from the boundary agreements, this Court finds no evidence apart from the boundary agreements of a conspiracy which caused harm to plaintiff. Since the jury found such boundary agreements were not part of a conspiracy in unreasonable restraint of trade, the necessary nexus between a conspiracy and plaintiff's failure to receive a cable franchise is lacking. Accordingly, the defendants must prevail, and a judgment notwithstanding the jury verdict in their favor will be granted.

II. The Contentions of the Parties

The jury was instructed that in order to find that any of the defendants violated Section 1 of the Sherman Act, they had to find the following essential elements by a preponderance of the credible evidence:

> (1) that the particular defendant entered into a conspiracy or agreement with one or more other persons; and

1. Plaintiff also has filed a motion for leave to file a second amended complaint, in which the only new allegations are those related to plaintiff's standing as a consumer within the Gulf Coast franchise area to seek injunctive relief against Gulf Coast. Inasmuch as the conclusions reflected in this Order render plaintiff's standing as a consumer a moot issue, the Court hereby denies that motion.

(2) that the object of this conspiracy or agreement was to divide and allocate territories and thereby eliminate plaintiff or others as competitors for cable television franchises in Houston; *or* that the object of this conspiracy was to limit competition to those persons who participated in the agreement.

Instruction No. 12, Jury Charge.

Further, they were instructed as follows:

It is established that Gulf Coast agreed to divide or allocate the territories within which certain cable television companies would apply for a franchise, specifically with the Houston Cable and Westland groups. The question for you to determine is whether such agreements were made as part of a conspiracy which constituted an unreasonable restraint of trade which had a substantial adverse effect on competition. Also with regard to Gulf Coast, you must determine whether Gulf Coast engaged in a conspiracy with one or more other persons to limit competition for cable television franchises in Houston. If you determine that Gulf Coast entered such a conspiracy, you must determine whether that conspiracy constituted an unreasonable restraint of trade.

With regard to the City of Houston and Mayor McConn, if you determine from a preponderance of the evidence that either of those defendants participated in or acted in furtherance of a conspiracy to divide or allocate the territories within which the cable television companies would apply for a franchise with the purpose of excluding plaintiff from a franchise, or of a conspiracy to limit competition for cable television franchises, you must next determine whether such alleged conspiracy constituted an unreasonable restraint of trade, which had a substantial adverse effect on competition.

Instruction No. 17, Jury Charge.

In conformity with the instructions, two interrogatories concerning liability on separate conspiracy theories, one specifically related to boundary agreements and one related to a conspiracy independent of those agreements, were submitted to the jury. The first interrogatory encompassed the issue of whether the established boundary agreements were part of an illegal conspiracy,[2] and the jury responded with a negative answer. The third interrogatory encompassed the issue of whether any of the defendants participated in an illegal conspiracy to ensure that only co-conspirators would receive franchises,[3] and the jury responded affirmatively, finding that defendants Gulf Coast, City of Houston and Jim McConn participated.[4] The jury then found causation and damages in affirmative answers to Interrogatories Nos. 5 and 6.

INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of Section 1 of the Sherman Act? Answer "Yes" or "No".

ANSWER: Yes

If you have answered Interrogatory No. 3 "yes", answer Interrogatory No. 4. If you have answered Interrogatory No. 3 "no", answer Interrogatory No. 5.

2. That interrogatory provides, in its entirety, as follows:

PLAINTIFF'S BURDEN OF PROOF

INTERROGATORY NO. 1

It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises. Do you find from a preponderance of the credible evidence that these agreements were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act? Answer "yes" or "no".

ANSWER: No

If you have answered Interrogatory No. 1 "yes", answer Interrogatory No. 2. If you have answered Interrogatory No. 1 "no", answer Interrogatory No. 3.

3. That interrogatory provides, in its entirety, as follows:

4. Before the case was submitted to the jury, all defendants proposed that Interrogatories 1 and 3 be combined in a single question. Plaintiff objected on the ground that combining the two questions materially would alter plaintiff's theory of the case.

Defendant Gulf Coast contends that it is entitled to judgment based on the negative answer to Interrogatory No. 1, for the following reasons:

(1) Given the finding that the boundary agreements were not part of an unlawful conspiracy, there is no evidence to support an affirmative answer to Special Interrogatory 3;

(2) The finding that the boundary agreements were not part of an unlawful conspiracy precludes an affirmative answer to Special Interrogatory 5—that an unlawful conspiracy proximately caused injury to plaintiffs' business or property—since there is no evidence of any unlawful conspiracy contributing to plaintiffs' failure to obtain a franchise other than testimony linking the boundary agreements with such failure; and

(3) The finding that the boundary agreements were not part of an unlawful conspiracy resolves all arguments against the applicability of *Noerr-Pennington* to the facts of this case and renders that doctrine controlling as a matter of law.

Defendants City of Houston and McConn contend that they are entitled to judgment on the following grounds, *inter alia*:

I. In light of the jury's answer to Special Interrogatory No. 1, there is no evidence to support the jury's answers to Special Interrogatories Nos. 3 and 5....

II. In light of the jury's answer to Special Interrogatory No. 1, the evidence is conclusive that all other actions of the Mayor and the City of Houston were within the scope of the legislative process, and are exempted from antitrust liability....

[1, 2] Plaintiff asserts that it has never taken the position that the boundary agreements simply were a more specific and all-inclusive description of the conspiracy to limit competition. Instead, plaintiff's theory throughout the course of proceedings was that "the boundary agreements were illegal standing alone [5] as well as being part of the conspiracy to limit competition", and plaintiff asserts that the boundary agreements "were not the only acts that [it] put in evidence to establish the existence of a conspiracy to limit competition." [6] Plaintiff characterizes the conspiracy addressed in Interrogatory No. 3 as one in which the "co-conspirators agreed to limit competition from non-conspirators, including plaintiff..., [and agreed] to limit competition with each other." [7]

5. Plaintiff had requested a *per se* instruction on the boundary agreements, which the Court concluded could not be submitted to the jury.

6. The Court cannot agree with plaintiff's characterization of the jury's answer to Interrogatory No. 1 as a finding only "that plaintiff had not proved by a preponderance of the evidence that *two* agreements on boundary lines were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act." (emphasis added). Neither Instruction No. 17, refer to pp. 995–996, *supra*, nor Interrogatory No. 1, refer to note 2, *supra*, was phrased to include exclusively Gulf Coast's agreements with Houston Cable and Westland. The jury was instructed to determine whether "such" agreements on boundary lines were part of a conspiracy, and the Court is persuaded that the intent of the jury instructions as well as that of the jury in responding to Interrogatory No. 1, was that all agreements to allocate and divide territories which were made among franchise applicants were encompassed by the language of the inquiry relating thereto. Accordingly, the Court concludes that the jury found that plaintiff had failed to prove that any boundary agreements which were made among applicants were part of an illegal conspiracy.

7. In discussing the differences in the two liability interrogatories, and the necessity of submitting separate questions, plaintiff observes that, "The jury ... [was] asked whether [the boundary agreements] were proven to be part of a conspiracy in restraint of trade, and they said "no," while at the same time determining that there *was* a conspiracy in restraint of trade." Defendant Gulf Coast's analysis of the jury's answers to the two interrogatories provides an explanation of the jury's intent in so answering:

> Thus the jury must have concluded that the boundary agreements were not part of a conspiracy in unreasonable restraint of trade 'to limit competition for cable television franchises.' Nevertheless, they answered the third interrogatory in the affirmative, apparently believing there was some conduct wholly unrelated to the boundary agreements which was legally cognizable as a conspiracy in unreasonable restraint of trade to limit competition for cable franchises.

The Court agrees with plaintiff that "Special Verdict 1 is a narrower, not a more precise,

III. The Test for Sufficiency of the Evidence and The Relevant Proof

On motions for ... judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, ... The motions for ... judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict.

Boeing Company v. Shipman, 411 F.2d 365, 374–75 (5th Cir. 1969) (*en banc*); *accord, Bazile v. Bisso Marine Company*, 606 F.2d 101, 104 (5th Cir. 1979), *cert. denied*, — U.S. ——, 101 S.Ct. 94, 66 L.Ed.2d 33 (1981). Pursuant to the Court's obligation to implement that standard, the Court carefully has reviewed documentary evidence and testimony in the light most favorable to plaintiff, and has analyzed comprehensively the plaintiff's assertions regarding the inferences to be drawn therefrom.

The Court concludes that with regard to liability of defendants for a conspiracy to limit competition of non-conspirators and to limit competition among co-conspirators, that is, whether such a conspiracy existed independent of the boundary agreements and whether defendants Gulf Coast, City of Houston and McConn participated in it, substantial evidence exists in the record to create a likelihood that reasonable persons could reach different conclusions. With regard to evidence of a causal relationship between that conspiracy and plaintiff's failure to be awarded the franchise for which it applied, however, the record presents insufficient evidence, and the Court concludes that reasonable persons could not decide otherwise. Accordingly, the Court finds

inquiry than Special Verdict 3," and remains of the opinion that submission of separate liability interrogatories was not only necessary for consistency with the plaintiff's theory that the boundary agreements were part of a conspiracy but were not intended to constitute an all-inclusive and exclusive description of the conspiracy, but was compelled by an evaluation of the evidence which had been presented to the jury. *See Boeing Company v. Shipman*, 411 F.2d 356, 374–75 (5th Cir. 1969) (*en banc*) ("A mere scintilla of evidence is insufficient to present a question for the jury.... There must be a conflict in substantial evidence to create a jury question."). Further, the Court concludes that, on the basis of the evidence which was presented to the jury, the interrogatories were constructed to avoid answers which would create irreconcilable conflict and, in fact, the answers present no such conflict. Accordingly, the Court declines to treat Gulf Coast's alternative motion as one for new trial.

The Court is required to " 'search for a view of the case that makes the jury's answers consistent.' ... Even if a conflict exists, [the Court] must inquire whether the inconsistency can nonetheless be read as 'a consistent expression of intent that [defendants are] either liable or excluded from liability.' " *Special Promotions, Inc. v. Southwest Photos, Ltd.*, 559 F.2d 430, 432 (5th Cir. 1977), *quoting Gonzales v. Missouri R. R. Co.*, 511 F.2d 629, 633 (5th Cir. 1975) *and Griffin v. Matherne*, 471 F.2d 911, 916 (5th Cir. 1973). This Court perceives no difficulty in viewing the answers to interrogatories 1 and 3 as a consistent expression of intent that defendants are liable for participation in a conspiracy to limit competition, notwithstanding that the boundary agreements were not part of the conspiracy. As is reflected in the analysis at 1005–1010, *infra*, the deficiency arises in the sufficiency of evidence to support a finding that said conspiracy was causally related to plaintiff's injury.

Additionally, the Court observes that it is unpersuaded by defendants' assertions that plaintiff raises new, previously unpled, theories by its assertion that the conspiracy of Interrogatory No. 3 encompassed an illegal agreement to exclude non-conspirators from competition, and to limit the competition among co-conspirators. Review of Plaintiff's First Amended Complaint at ¶ 38 & ¶ 39, and plaintiff's Joint Pretrial Order of January 12, 1981, at 11–14, indicates that plaintiff espoused its theory of the case consistently throughout the course of proceedings.

that the absence of evidence of causation cannot support a verdict in plaintiff's favor based on an affirmative answer to Interrogatory No. 5.

A. The Issue of Liability

[3, 4] The Court agrees with plaintiff that the jury's affirmative answer to Interrogatory No. 3 reflects its "apparent conclusion that the conspiracy to limit competition was an agreement or understanding that franchises would be awarded only to those applicants that were approved by Gulf Coast and other nondefendant participants", and with defendant Gulf Coast that "apparently [the jurors believed that] there was some conduct wholly unrelated to the boundary agreements which was legally cognizable as a conspiracy in unreasonable restraint of trade to limit competition for cable franchises." As defendants have contended, plaintiff focused throughout the case on the boundary agreements and the negotiations surrounding them, as is apparent from plaintiff's pleadings and proof.[8] The jury's rejection of plaintiff's predominant theory, however, will not suffice to resolve the question of whether proof exists in the record to support a theory which plaintiff espoused but did not emphasize.

In Plaintiff's Brief Demonstrating Inferences from the Evidence, plaintiff identifies many excerpts from the testimony as well as related documentary evidence from which inferences can be drawn to support the existence of a separate theory of conspiracy to limit competition that is not contingent upon evidence concerning boundary agreements. Plaintiff has reached the correct result in its analysis of the evidence. The Court has determined, however, that some of the proof identified by plaintiff is inappropriate for consideration because that evidence relates solely to boundary agreements encompassed in Interrogatory No. 1. In order to demonstrate clearly the evidence apart from that of boundary agreements which tends to show the existence of, and acts done in furtherance of, a conspiracy to exclude non-conspirators and to limit competition among co-conspirators, the Court feels obligated to set forth a summary of the history of the franchise process followed in Houston and a detailed recitation of the evidence which demonstrates that the conspiracy encompassed in Interrogatory No. 3 existed.

1. History of Franchising Process

Between July 1978 and August 1978 several applications for cable television franchises were filed with the City: Gulf Coast, the first; Houston Cable; Meca; Houston Community Cable; and G. B. Communications. In September 1978, Westland also made application, and plaintiff, Affiliated Capital, having divested itself of ownership of a savings and loan association and thereby becoming eligible to apply for a franchise, hired an attorney to assist it in obtaining a franchise. In October 1978, the City hired a consultant, Robert Sadowski, to evaluate the applications; the consultant's employment was terminated in November, 1978. Also in October, plaintiff announced by letter to City Council its intention to apply for a franchise, and in November, City Council sent to plaintiff an application form. Plaintiff filed its application on November 16, 1978, and filed a supplemental application on November 28, 1978. The November 29, 1978 City Council agenda contained six cable television ordinances: Gulf Coast; Houston Cable; Meca; Houston Community; Westland; and G. B. Communications. At the November 29 meeting, the ordinances were tabled until December 13, 1978, and plaintiff was granted a hearing on its application on December 12, 1978.

8. Defendants make much of plaintiff's closing argument and the focus therein on boundary agreements. The Court acknowledges that the content of the closing argument tends to demonstrate further that plaintiff concentrated heavily on proving the boundary agreements and relied to a large extent on the existence of the agreements to prove an antitrust violation. Relying on the closing arguments, or utilizing their content for any aspect of the resolution of these motions, however, is impermissible inasmuch as nothing contained therein constitutes evidence.